IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION X

MICHAEL DALE RIMMER	)	
Petitioner	)	
v.	)	**NO. 98-01034, 97-02817, 98-01033**
STATE OF TENNESSEE	)	
Respondent	)	**FILED** 5/19/11 **KEVIN F. KEY, CLERK** **BY** D.C.
	)	

ORDER

This matter came to be heard upon petitioner, Michael Dale Rimmer's, Motion to Disqualify the Shelby County District Attorney General's Office. In September 2009 petitioner filed a motion asking this court to disqualify the entire Shelby County District Attorney General's Office from representing the State in his post conviction matter. Petitioner asserts that Assistant District Attorney General Tom Henderson, who represented the State during the prosecution of petitioner for murder, aggravated robbery and theft, knowingly presented false testimony during petitioner's trial and withheld exculpatory evidence. Based upon these assertions, petitioner contends both Henderson and the entire Shelby County District Attorney General's Office must be barred from further participation in his case. Petitioner asserts that General Henderson's behavior creates an actual conflict of interest for the Shelby County

District Attorney General's Office; or, at the very least, the continued involvement of the Shelby County District Attorney General's Office in petitioner's case would create an appearance of impropriety.

Following an evidentiary hearing, this court denied petitioner's Motion to Disqualify the District Attorney's Office. Thereafter, petitioner submitted an application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 9. Petitioner also filed a "*Motion to Reconsider Disqualification of District Attorney's Office.*" This court denied the petitioner's motion to reconsider its previous ruling. However, the court granted petitioner's permission to appeal, noting that, if the appellate court disagreed with this court's determination regarding disqualification, then petitioner may be entitled to a new post conviction hearing. Finding such procedure would create unnecessarily delay and expense, the court agreed to allow counsel to seek appellate review of its decision prior to proceeding with the post conviction evidentiary hearing. However, the Court of Criminal Appeals denied permission for interlocutory appeal finding that there was no need for an immediate review of the disqualification issue. See Michael Dale Rimmer v. State of Tennessee, No. W2009-02371-CCA-R9-PD (filed June 14, 2010, at Jackson).

Following the Court of Criminal Appeals order, this court set a date for the post conviction hearing. Meanwhile, petitioner appealed the decision of the Court of Criminal Appeals regarding the issue of disqualification. Subsequently, the Tennessee Supreme Court issued the following unpublished order:

> Upon consideration of the *Tenn. R. App. P. 11* application for permission to appeal and the entire record in this case, the Court is of the opinion that the application should be, and is hereby, granted for the purpose of remanding the case to the Shelby County Criminal Court for the purpose of conducting an evidentiary hearing to determine whether the district attorney general should be disqualified from further participation in this case on the grounds asserted by the

applicant. This hearing should occur, and a determination concerning whether disqualification is necessary should be made, before the hearing on the underlying post-conviction petition is conducted.

See Michael Dale Rimmer v. State of Tennessee, No. W2009-02371-SC-S09-PD, 2010 LEXIS 936 (Filed September 24, 2010, at Jackson).

Initially, this court notes its confusion regarding the Tennessee Supreme Court's mandate. On September 18, 2009, this court held a hearing on petitioner's Motion to Disqualify the District Attorney General. At such time petitioner could have submitted any evidence he wished to present in support of his claims. There were no limitations placed on petitioner or his counsel. In their opening statements counsel indicated "we don't have any evidence . . . to present on the motion. We are, however, prepared to address it and any concerns the Court might have."[1] Although no testimony was presented in support of the motion, petitioner did submit certain materials as attachments to their motion to disqualify. Such materials were reviewed by the court prior to issuing its ruling and were included in petitioner's application for permission to appeal. Also included in the appellate record was the transcript from the September 18, 2009 hearing and this court's order denying disqualification.[2] Nevertheless, upon remand from the Tennessee Supreme Court, this court informed the parties that it would again conduct an evidentiary hearing on the issue of disqualification and that the parties may present any additional evidence they wished the court to consider either in support of such a motion to disqualify or in response to such motion. The hearing was conducted on January 24, 2011.

Testimony Presented at the January 24, 2011 Hearing

[1] See Michael Dale Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings September 18, 2009, page 2.
[2] See Michael Dale Rimmer v. State of Tennessee, CCA No. W2009-02371-CCA-R9-PD, Petitioner's Appendix to Application for Permission to Appeal From Denial of Rule 9 Application, Vol. 3, page A-484.

At the January 24, 2011, hearing, Lucian Pera testified that he is an attorney with the Memphis based law firm of Adams and Reese. He stated that he often represents clients on matters relating to legal ethics and professional responsibility. He stated that in addition to his legal practice, he also does volunteer consulting in the area of legal ethics and professionalism for various bar associations. Pera testified that, since 1985 he has worked with the Tennessee Bar Association on legal ethics issues. He stated he "ran the committee" on Ethics and Professional Responsibility from 2000 to 2009.[3] He further stated that he was appointed to an American Bar Association Committee assigned to revise the ABA Model Rules of Professional Conduct. However, Pera testified that he has never been a witness or expert in a criminal matter. Although Pera further stated that he has never consulted on criminal matters and has never handled criminal cases in his own practice; this court, nevertheless, allowed Mr. Pera to testify as an expert in the general area of ethics.

Pera testified that he reviewed counsel's application for permission to appeal to the Tennessee Supreme Court and the appendices that were filed along with that application; petitioner's Motion to Disqualify the District Attorney General and memorandum in support of such motion; the State's Response to the motion to disqualify; and the State's response to petitioner's application for permission to appeal. Pera testified that he understood that there are two areas of allegations against General Henderson, one relating to an alleged *Brady* violation and the other relating to allegations that Henderson knowingly offered false testimony at petitioner's trial. He further stated that his understanding is that Henderson plays a supervisory or administrative role within the Shelby County District Attorney General's office.

[3]See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 9.

Pera testified that in his opinion Henderson has a conflict of interest which would preclude him from participating in petitioner's post conviction proceedings. Pera testified that in his opinion Henderson has a "material limitation conflict"[4] under Rule 1.7. He further testified that, due to the fact that he may be called as a witness during petitioner's post conviction hearing, Henderson also has a conflict under Rule 3.7. With regard to the "material limitation conflict," Pera testified that Henderson's responsibility to his client, the State of Tennessee, would be significantly impacted by his own personal interest.

Essentially, Pera testified that Henderson's personal interest in protecting his reputation or professional standing would "materially limit" his ability to fulfill his role as a prosecutor and his obligation to be "impartial" and to seek "justice."[5] Pera contends that, unlike other lawyers who have only a duty to their client, prosecutors are held to a higher standard; thus, under the Rule the balance to be evaluated is between personal interest and "justice," not personal interest and client interest. Pera testified that in order to determine if disqualification is required a court must look ahead and evaluate the allegations to determine "what is the likelihood that a difference in interest will eventuate."[6] He stated that in his opinion, evaluating the allegations against General Henderson, it is clear that Henderson's personal interest will affect his professional responsibilities as a prosecutor. Pera further testified that General Henderson should also be disqualified under Rule 3.7. He stated that, if Henderson is "likely to be a

[4] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 23.
[5] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 26-27.
[6] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 29.

necessary witness," then he must be disqualified.[7] He stated that he found none of the Rule's listed exceptions applied.

Next Pera was asked to discuss his opinion regarding the necessity for disqualification of the entire Shelby County District Attorney General's office. Pera testified that, under Rule 1.7, the entire office should be disqualified. He testified that the court should look to whether "there is a significant risk there'd be a material limitation on the ability of the prosecutor handling this matter for the state to handle that representation, to discharge the duties that they are required to discharge."[8] He stated that in his view "there is a significant risk of material limitation because of the severity of the nature of the allegations."[9] Pera acknowledged that, under his analysis of the Rule, to make a determination as to disqualification the court would need to "guess" whether the allegations against Henderson are true.[10] He provided the following explanation:

> [F]or example, if an allegation were made that Mr. Campbell, for example, had, you know, committed a Brady violation and put on a lying witness, all right. And if the Court were able to conclude very quickly that this is ridiculous, that the facts put forward in support of this allegation are facially deficient that, you know, I can't even gin up the right facts to get us there. But if that were the conclusion to be made then at this stage, if somebody said, well he needs to be disqualified, then the right answer would be, well, of course not. Because there's not a significant risk of a material limitation. And we deal with, I deal with that, not all the time but not infrequently in the sort of malpractice context of discovery of use context where the allegation is one that is there's not significant evidence to support it. Or the consequences are such, you know, if the document that was allegedly misheld [sic] or withheld is of so little importance, for example, that it doesn't make any difference. Yes, it wasn't turned over when it should have been. Yes, it's been withheld for a year. Yes, you know, but it doesn't matter, it doesn't go to anything. It wouldn't have changed any of the discovery. It wouldn't of

[7] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 30.
[8] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 32.
[9] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 33.
[10] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 34-35.

changed any witness' testimony. Then, if the allegations are like that, then there's possibly not a significant risk of material limitation.[11]

He stated that with regard to the office as a whole the question becomes "do they have . . . a personal interest in the integrity of Mr. Henderson, in the credibility of Mr. Henderson, in the professional standing of Mr. Henderson and in the integrity and credibility and standing of the office generally."[12] Pera testified that "given the seriousness of the allegations," he has a "hard time concluding anything other than that almost any lawyer in the office would . . . have a significant risk of a material limitation."[13] He stated that he based his opinion solely "on the basis that serious allegations have been made against the office and there would be a strong personal interest urging that lawyer to vindicate the office they've committed their career and time to."[14]

Pera further testified that the issue of Henderson's role as a supervisor would also suggest disqualification of the office is required. He stated that "the fact that Mr. Henderson is a supervisor in the office may well heighten the interest of another lawyer in the office in, frankly, vindicating him."[15] He stated that due to the fact that Henderson is a supervisor it would be difficult to impellent any legitimate screening mechanisms that would keep Henderson from

[11] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 36.
[12] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 36.
[13] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 37.
[14] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 37.
[15] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 37.

being a part of the "decision making process" with regard to petitioner's post conviction claims.[16]

On cross examination Pera acknowleged that every time a defendant or petitioner makes an allegation of prosecutorial misconduct, it is a "serious" allegation.[17] He stated that he would not be surprised if a defendant made such allegations in a Motion for New Trial. He stated that such allegations would not necessarily disqualify the prosecutor from handling the case. In fact, he stated that in most instances disqualification would not be warranted. He stated that such determinations would need to be addressed by the court and in making that determination the court would need to be able to "predict the future."[18] He stated that he understood, at this point, there is a vigorous conflict between petitioner's counsel and the State regarding whether any *Brady* violation actually occurred. He stated that the allegation that most concerns him is the allegation relating to false testimony of a witness. Pera testified that he felt there was some evidence that Henderson knew or should have known that the witness in question provided false testimony. He indicated that if the only allegation had to do with alleged *Brady* violations, he is not sure he would recommend disqualification.

Pera acknowledged that he did not discuss the allegations with Henderson. He stated that his opinion was based solely on documents provided to him by petitioner's counsel. He indicated that he found the evidence he reviewed "clearly" established that Henderson knowingly

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[16] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 41-42.
On cross examination Pera stated that he was not aware that General Campbell now served in a supervisory capacity over General Henderson. However, he stated such arrangement did not alter his opinion.

[17] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 50.

[18] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 52.

presented false testimony.[19] Pera testified that because the State had challenged the allegations against Henderson in Response to petitioner's petition for post conviction relief, the office is essentially "defending" Henderson rather than administering justice, which Pera testified was the role of the prosecutor.[20]

Tennessee Supreme Court Rule 8: Model Rule 1.7

Tennessee Supreme Court Rule 8, Model Rule 1.7(a) states that:

> A lawyer shall not represent a client if the representation of the client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes it will not adversely affect the relationship with the client; and
>
> (2) each client consents in writing after consultation.

Section (b) of the Rule states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents in writing after consultation.

The rule essentially breaks potential conflicts into two categories, those that are directly adverse to a client's interest and those that materially limit an attorney's ability to provide representation to the client. The comments to the rule state that, "loyalty and independent judgment are

[19] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 56.
[20] See Michael D. Rimmer v. State of Tennessee, 97-02817; 98-01033; 98-01034, Shelby County Criminal Court Division X, Petition for Post Conviction Relief, Transcript of Proceedings January 24, 2011, page 60.

essential elements in the lawyer's relationship to a client." With regard to material limitations, the comments to the former rule stated:

> even where there is no direct adversity between clients, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternative that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure or consent. The critical questions are: what is the likelihood that a difference in interests will eventuate and, if it does, will it materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?

The language in the comments to the new Rule, effective January 1, 2011 is as follows:

> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or otherwise foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

The comments to the Rule specifically address the personal interests of the lawyer, stating: "the lawyer's own interests should not be permitted to have an adverse effect on representation of a client." The comments to the former Rule provide the following example of a personal interest with may adversely affect a lawyer's representation of their client: "if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice."

While ordinarily, a client may consent to representation notwithstanding the conflict of interest, the comments to the Rule state:

> as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation

> of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent.

The new rule further states that, "in the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this rule.

Model Rule 1.0(g) defines "material" or "materially" as "something that a reasonable person would consider important in assessing or determining how to act in a matter." Model Rule 1.0(k) states that "reasonable belief" or "reasonably believes," "when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Model Rule 1.0(m) defines "substantial" or "substantially" as "something that is not only material but also of clear and weighty importance."

Tennessee Supreme Court Rule 8: Model Rule 3.7

Tennessee Supreme Court Rule 8, Model Rule 3.7(a) states that:

> A lawyer should not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
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> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of the legal services rendered in the case;
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

PROSECUTOR'S ETHICAL RESPONSIBLITIES

In State v. Culbreath, 30 S.W.3d 390 (Tenn. 2000), the Tennessee Supreme Court established standards for determining whether a prosecutor should be disqualified under the Model Rule. Citing Tennessee Rule of Supreme Court. 8, EC 5-1, the court held:

> In determining whether to disqualify a prosecutor in a criminal case, the trial court must determine whether there is an actual conflict of interest, which includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of 'compromising interest and loyalties.'

Culbreath , 30 S.W.3d at 312-313. The Court held even where "there is no actual conflict of interest, the court must nonetheless consider whether conduct has created an appearance of impropriety." In Culbreath, the Court also considered whether the disqualification of a particular prosecutor also required the disqualification of the entire District Attorney General's Office. Citing State v. Tate, 925 S.W.2d 548, 550 (Tenn. Crim. App. 1995), the Court held:

> If disqulafiication is required under either theory, the trial court must also determine whether the conflict of interest or appearance of impropriety requires disqualification of the entire District Attorney General's office. The determination of whether to disqualify the office of the District Attorney General in a criminal case rests within the discretion of the trial court.

Culbreath, 30 S.W.3d at 313. For purposes of deciding whether a prosecutor or his office should be disqualified from participation in a criminal case, the appellate courts have adopted the following analytical framework:

> (1) Do the circumstances of the defendant's case establish an actual conflict of interest that requires the disqualification of a prosecutor? (2) Do the circumstances of the defendant's case create an appearance of impropriety that requires the disqualification of a prosecutor? (3) If either theory requires the disqualification of a prosecutor, is the entire District Attorney General's office likewise disqualified?

State v. Randy Lee Owenby, 2009 Tenn. Crim. App. LEXIS 40, *48, citing, State v. Coulter, 67 S.W.3d, 29 (Tenn. Crim. App. 2001) (citing Culbreath, 30 S.W.3d at 312-313; Tate, 925 S.W.2d at 550.

In evaluating the disqualification of both the individual prosecutor and the office of the District Attorney General, the Culbreath Court described the role of the District Attorney General, stating:

> a prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. citing, Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). The court again cited Tenn. R. Sup. Ct. 8, EC 7-13:

> With respect to evidence and witnesses, the prosecutor has responsibilities *different from those of a lawyer in private practice*; the prosecutor should make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because the prosecutor believes it will damage the prosecutor's case or aid the accused.

The court noted that "prosecutors are expected to be impartial in the sense that they must seek the truth and not merely obtain convictions. . . . Yet, at the same time, they are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct." Culbreath, 30 S.W.3d at 314, citing Berger, 295 U.S. at 88, 55 S.Ct. at 633. In Culbreath the Court concluded that the trial court had not abused its discretion in disqualifying the District Attorney General's office from prosecuting appellant's case, where the District Attorney General's office had used a private attorney to assist in investigation and prosecuting certain offenses, and the private attorney was compensated for his actions by a private, special interest group. The Court concluded that prosecution's appointment and use of a private attorney

who received substantial compensation from a private, special interest group created a conflict of interest and an appearance of impropriety that required disqualification of the entire District Attorney General's office. See Culbreath, 30 S.W.3d 309.

However, in Tate, the Court held that a "prosecutor's disqualification need not be imputed to the 'entire district attorney general's office . . . so long as the attorney at issue does not disclose confidences or otherwise participate in the prosecution." Tate, 925 S.W.2d at 556. For instance, the appellate courts have concluded that "an Assistant District Attorney General's participation in the investigation leading to indictment and prosecution of a defendant does not disqualify him from prosecution of the underlying case." Likewise, the appellate courts of this state have determined that "an attorney, employed by the state and involved in the prosecution of the case who may be called as a witness by the opposing party is not subject to disqualification unless and until it becomes evident that his testimony will be prejudicial to the interests of his client." See Owenby, 2009 Tenn. Crim. App. LEXIS 40, *27 (citing, State v. Browning, 666 S.W.2d 80, 87 (Tenn. Crim. App. 1983 and State v. Zagorski, 701 S.W.2d 808, 815 (Tenn. Crim. App. 1985)). Essentially, the "focus on whether a district attorney or any assistants within the office should be disqualified often depends upon the value of their testimony." State v. Baker, 931 S.W.2d 232, 237 (Tenn. Crim. App. 1996).

In September of 2001, the Tennessee Board of Professional Responsibility issued Advisory Ethics Opinion No. 2001-A-750 in the case of State v. Sudderth. Sudderth was charged with capital murder and conspiracy to commit murder by hire. Prior to Sudderth's trial, his co-defendant, Arthur Copeland, was convicted and sentenced to death for the victim's murder. The prosecuting attorneys in Sudderth's case, also prosecuted the Copeland case. An advisory opinion was sought by the prosecution following allegations by the principle witness,

[Ashley James],[21] that (1) prior to her testimony in the Copeland case she was told by the prosecuting attorneys what emotions to show and was told to cry during her testimony; (2) the prosecutors knew that another witness supplied her with cocaine while she was being afforded around-the-clock police protection prior to trial in the Copeland case; (3) the prosecutors asked her to change her version of the facts to coincide with the anticipated testimony of another prosecution witness; and (4) the prosecutors told her it would be in her best interest not to speak with defense attorneys prior to trial of the initial case. The witness was the only individual who could place Sudderth and Copeland together shortly before the murder. Her statement regarding these allegations was obtained by a defense investigator in the Sudderth case and was tape recorded. The investigator provided the court an affidavit outlining the allegations. The prosecution denied the allegations. Upon reviewing the potential conflict for both the individual prosecutor affected by the allegations, the Board found that the prosecuting attorneys should seek to withdraw. The Board noted that a prosecutor has a duty not only to convict; but, to "seek justice." The Board further noted that American Bar Association Standards Relating to the Adminstration of Criminal Justice, states in Rule 3.13(a) that , "a prosecutor should avoid conflict of interest with respect to his or her official duties." The Board found in the instant case that,

> The prosecutor's responsibility in this case to administer justice, exercise sound discretion and seek justice, not merely convict may be tempered by their personal interests to vindicate themselves from the accusations of misconduct by zealously seeking a conviction; or their zeal to vindicate themselves may be perceived as conflicting with their professional judgment in prosecuting the case.

The Board further found such conflict was not waivable. In addition to the conflict of interest discussed above, the Board also found, given the allegations and the importance of the witness, it was likely the prosecutors would become witnesses at Sudderth's trial. The Board found such

[21] See State v. Copeland, 2005 Tenn Crim. App. LEXIS 916, *110.

circumstance also compelled the prosecutors to seek to withdraw from the case. Finally, the Board acknowledged that its opinion was not binding on the Court, the Board, or Ethics Committee. Following the Board's opinion the trial court in the Sudderth case ruled that the affected prosecutors were disqualified from prosecuting Sudderth.[22] It appears the trial court based its decision solely upon the affidavit of the defense investigator.[23]

Thereafter, attorneys for Arthur Copeland challenged his conviction and sentence asserting, among other things, prosecutorial misconduct associated with the allegations addressed by the Board in Sudderth. Subsequently, Copeland also sought the disqualification of the affected prosecutors and the District Attorney General's Office. Counsel's motion for disqualification was filed during the pendency of Copeland's Motion for New Trial. Following a hearing, the trial court overruled Copeland's motion to disqualify the prosecutors. The trial court held:

> The reason, in a nutshell, is that all of this came to light after the jury trial was already over. And the bulk of the motion for new trial had already been argued and resolved.
>
> . . . .
>
> So - - you know, if this was a trial - - if I was hearing this in relation to an up-coming trial on the merits, then my decision might be very different. But since the trial has already happened and she's not going to be testifying at trial and they're not going to be compelled to be called, then I think it's a totally different situation from Suddarth's case.

State v. Copeland, 2005 Tenn. Crim. App. LEXIS 916, *129.

This court notes that at the hearing on Copeland's motion for new trial Detective Bill Manuel testified that

> in the weeks before trial, James feared for her own safety. She requested and was provided protection by the sheriff's department. She was housed at motels in

[22] See State v. Copeland, 2005 Tenn. Crim. App. LEXIS 916.
[23] Id.

> Knox and Louden counties, accompanied by a deputy who stayed in an adjoining room. Detective Manuel further stated that deputies did not try to 'control' James; she could freely come and go, she made telephone calls, received visitors and initially continued to work, with the deputy coming with her to and from her job site. Before trial, the prosecutors arranged a meeting in a conference room of the district attorney general's office between James and defense counsel. James, however, declined to speak with defense counsel.

Copeland, 2005 Tenn. Crim. App. LEXIS 916, *110-111.

James also testified at the Motion for new trial hearing and stated that the prosecutors merely told her she did not have to speak to anyone she did not wish to speak to. She stated she was never told "not" to speak to defense counsel; rather, she was told she "did not have to" speak with them. She denied telling defense investigators otherwise. See Copeland, 2005 Tenn. Crim. App. LEXIS 916, *111. James further testified that she told the defense investigators "that we went over things and we met several times to discuss," but also told the investigators that the prosecutors "didn't tell me what to say." She indicated the defense investigators "were trying to make it seem like they [the prosecutors] told me what to say." Id. at * 117. James testified that the prosecutors told her "to try to show a little bit more emotion instead of being so angry and uptight and rude to whoever was questioning me." Id. With regard to allegations that the prosecutors asked James to change her story to conform to that of another witness, Myron Kellogg, James testified that "they kept asking me things that Myron had said, but they didn't try to make me change my story to what Myron had said." Id. at 118. The prosecutor in question admitted that, during a break, she had a private conversation with James and instructed James regarding the emotions she should display during her testimony. See Copeland, 2005 Tenn. Crim. App. LEXIS 916, *116.

On direct appeal of petitioner's conviction and sentence, petitioner challenged the trial court's denial of his motion to disqualify. In upholding the trial court, the appellate court agreed with the trial court's assessment that

> the considerations prompting the disqualification of the same prosecutors in Sudderth's upcoming trial were not also present in the defendant's case in view of the fact that the defendant's trial was over, he has been convicted and sentenced, and there was no potential that prosecutors would be compelled to be witnesses at trial.

Copeland, 2005 Tenn. Crim. App. LEXIS 916, *130. Thus, the Court found the trial court did not abuse its discretion in overruling the motion to disqualify the prosecutors from continuing to represent the state at the remainder of the hearing on the defendant's motion for new trial.

PETITIONER'S ALLEGATIONS OF MISCONDUCT AND EVIDENCE SUBMITTED IN SUPPORT OF THOSE ALLEGATIONS

I. Petitioner's Allegations

Petitioner asserts that the Assistant District Attorney, Thomas Henderson, improperly failed to turn over exculpatory evidence in the form of a police supplement outlining the results of a photo array shown to witness James Darnell and a composite sketch of the suspects Darnell described. Petitioner asserts Darnell provided a description of two white male subjects that he saw at the scene of the crime on the night of the murder. A composite sketch of the suspects Darnell described was prepared by law enforcement. Post conviction counsel asserts the sketches do not match petitioner and argues that Henderson failed to turn the sketches over to

trial counsel. Subsequent to Darnell providing a statement regarding what he witnessed on the night in question, Darnell was sent a photo array of potential suspects, including petitioner. Petitioner contends Darnell identified someone other than petitioner and alleges Henderson failed to inform trial counsel that another suspect had been identified. Petitioner further alleges that, at his resentencing, the case coordinator, Sgt. Robert Shemwell, falsely testified that petitioner had not identified anyone from the photo array. Petitioner alleges both Henderson and Shemwell knew this testimony was false and both purposefully presented false testimony to the jury.

II. Evidence in Support of Allegations

A. Shemwell's Testimony at the Resentencing:

At petitioner's resentencing, Shemwell testified petitioner was very quickly developed as a potential suspect in the victim's disappearance.[24] However, he stated that law enforcement followed numerous leads throughout the course of the investigation. He explained:

> We had a composite drawing obtained from an individual who was there that night and saw a man behind the checkout counter, which he knew was not suppose to be there. We distributed that flyer and after that was distributed in the newspaper and the media, we started receiving calls from anybody that looked like him. And we did our best to attempt to locate any photographs, arrest histories of those individuals, whether they were local, or out of town. We would notify those police department or penal facilities, or anything, to locate photographs to put in a photo spread. And I think that I accumulated something like, I want to say, fifty-something photographs, a total of different people.

He stated that the individual who provided the composite drawing was James Darnell. Shemwell testified that Darnell was in the military and was stationed in Hawaii. He stated that initially he did not speak directly with Darnell. He stated that Sgt. Bodding and Sgt. Wilkinson took

[24] It was not initially determined that the victim was deceased as the body was not located at the scene.

Darnell's statement and assisted in obtaining the composites. However, Shemwell testified that later in the investigation he spoke with Darnell by phone.

At this point in the testimony there was a series of objections and an offer of proof was made by defense counsel. When asked to testify as to the description Darnell had provided to law enforcement, Shemwell testified that "if your asking me height and weight, I can't recall. But I can advise that he gave us composite drawings of two individuals that he saw at the time that he went in to obtain a room that night." He stated that Darnell indicated he was at the motel around 2:15 a.m. Shemwell testified that Darnell told officers, "one [of the men] was on the outside of the lobby area, where he was at. And the other [man] was on the other side of the window, where the cashier would have been." He stated Darnell "advised that it appeared to him that the one on the inside was giving the one on the outside, that was in front of him, money and change. Dollar bills and change." Shemwell stated Darnell told officers "he believed that he saw blood from both these individuals' hands . . . around the knuckles." Counsel asked Shemwell what specific description Darnell provided of the two individuals. He stated:

> I can't recall. I believe he said that the individual on the inside was about five seven, or five eight, medium built, brown hair. And I want to say that he said that he was wearing what he thought to be blue jeans, I want to say a black shirt, maybe. And maybe a blue jacket. The individual on the outside was wearing a tee-shirt and he believed, I think if I'm not mistaken, that he said was ripped, or torn around the shoulders. He had a strawberry blondish, long, kind of unkept hair.

He stated that Darnell told officers he "thought these two individuals might have had a confrontation with each other." He further testified that Darnell believed the person on the inside of the office was the clerk. Defense counsel asked Shemwell if he showed Darnell any photographs of potential suspects and Shemwell replied, "I want to say that I shipped, or the F.B.I. sent photographs that I compiled. I want to say that there was something, like, fifty-

something photographs, of individuals who were named and Michael Rimmer's picture was in that group of photographs." Shemwell stated that Darnell "identified Michael Rimmer and another individual as someone that looked familiar to him. But he did not positively identify him as being the one that was behind, or in front of him at the hotel."

Defense counsel asked Shemwell whether the "identification information" was included in his "investigative report," and Shemwell indicated "it should be." He testified, "I believe it was sent back to us with a result from the F.B. I." Counsel asked if he "had those reports" with him and Shemwell again indicated that "they should be in the file." Shemwell was asked whether he could "refer to those reports" and tell the court "specifically what Mr. Darnell said with respect to that identification of Mr. Rimmer." Again, Shemwell testified that, although he did not personally speak with Darnell until later in the investigation, the information regarding his identification "should be" in the file. At that point counsel asked for a recess so that Shemwell could review his reports "to see exactly what was said, regarding the identification of Mr. Rimmer." Assistant District Attorney General Henderson reminded the court that Shemwell did not take the witnesses statement or coordinate the photo array; thus, he would need to review the entire investigative file in order to accurately testify about Darnell's statements and any identifications made by Darnell. Shemwell stated,

> I'd have to go through the whole thing, Your Honor. There was a conversation with me and I think, Stumpy Roberson, Seargent Roberson was the one that handled that, Your Honor, with the F.B.I. and sent it out there. They were all Fed-Ex'd out to this individual, an F.B. I. agent in Hawaii.

Thereafter, Shemwell was given an opportunity to review his file. Upon returning to the court Shemwell indicated that, during the recess he and Henderson went to the Shelby County District Attorney General's office and reviewed the entire case file. He stated that he could not locate a

supplement from Sergeant Roberson or from the F.B.I. regarding Darnell's identification. Shemwell testified as follows:

> Sgt. Roberson contacted the F.B.I., submitted that information [the photographs], I believe, to Agent Eakins here, locally. And she had already opened up a case file with the F.B.I. on the federal level, in order to do the blood work and other DNA evidence that we had. And she sent it to the agents in Hawaii for them to follow up. The photospreads of everyone that we could find photos on that was mentioned in any crime stopper, any informant information, or anybody's name that came up in the investigation.

Henderson asked Sgt. Shemwell if he remembered whether he ever got a written supplement containing the results of the photospread and Shemwell stated, "no" and indicated that, after looking at the file, he did not find a supplement setting forth the results of the photospread. Thereafter the following exchange occurred:

DEFENSE COUNSEL:	That is not all the records that we received to ascertain. I have a supplement that sets out the information provided to the police department during this investigation that was provided by the eye witness, James Darnell, and we're requesting that Officer Shemwell provide copies of the supplements from his investigative files, regarding the information gathered from James Darnell.
HENDERSON:	Isn't that what we were just talking about?
SHEMWELL:	I submitted everything that I have.
HENDERSON:	He's got the supplement. And for the records, I did go back and double check and it was furnished to his original counsel, along with all the crime stoppers and false lead information. So it's been around since 1998, at least.
COURT:	Furnished to the defense?
HENDERSON:	Yes sir. I keep a complete copy of everything that I've given to the defense. And Mr. Ron Johnson got it, along with all the other stuff.
. . . .	
DEFNESE COUNSEL:	Judge, I don't quite understand counsel's position. We were appointed on this case to represent Mr. Rimmer in

connection with this resentencing. We filed motions in connection with that appointment. We filed motions for exculpatory evidence. We got a response to those motions for exculpatory evidence and discovery motions and what have you. I didn't know that I am held accountable for documents that the Prosecutor's Office provided to Ron Johnson.

Obviously, we endeavored to gather all of the documents that we can. But, we haven't been provided any of this information by the Prosecutor's Office, since we have been on this case.

Quite frankly, the information that I have, the little bit that I have, regarding this particular subject matter, that being that of Jim Darnell, came from the defendant himself. I found no such information in the copies that I got from Mr. Johnson's office, or Mr. Scholl's office or the Skahan's office. We haven't been provided with it.

Now, if I'm held accountable for something that the Prosecutor's Office provided to some other counsel on this matter, during some other trial proceeding, I didn't know that I was being held accountable. I didn't know that. I didn't understand that that's the way the rules were. That once you provide it to some counsel, at some stage, that that also covers your obligation to provide that information to present counsel. If it does, then fine, but I didn't understand that.

COURT: Did you request from the Public Defender's Office, Mr. Johnson's file?

DEFENSE COUNSEL: I requested the file from Mr. Johnson. . . . . The documents were provided, how complete they were–

COURT: Okay. Did you request through the Skahan's who handled the appeal, what they had?

DEFENSE COUNSEL: I got – let me back up just a minute. We didn't request documents from Ron Johnson. . . . . I didn't request documents from the Public Defender's Office. I requested documents from Mr. Scholl. He was on the case before we were. . . . . Mr. Scholl had gathered documents for the P.D.'s

Office and I went to Mr. Scholl's office and got everything he had.

COURT: Where do you think your client got it?

DEFENSE COUNSEL: From one of these counsels

COURT: From Mr. Scholl.

DEFENSE COUNSEL: Yeah, that's my understanding. . . . . Mr. Rimmer provided me with the little information that I do have, as it relates to this particular witness.

. . . .

HENDERSON: Your Honor, that's the only supplement that there is about Mr. Darnell. He thinks that there's a whole investigative file on it, there's not. There's a two page, or a page and a half supplement on it.

DEFENSE COUNSEL: Well, the problem with that is that the copy that I got has got a couple or three lines that are not legible. On the copy that I have.

COURT: See if Mr. Henderson has something.

HENDERSON: Your Honor, if I thought that we were fighting over whether or not two lines were legible, we probably could have handled this some time ago. . . . . There is one sentence missing off the top of the second page.

. . . .

COURT: Okay. One line. Now, does that improve the document that you were given by your client?

DEFNSE COUNSEL: Yes sir. . . . . We are ready to proceed.

Defense counsel asked Shemwell if any efforts were made to see if Darnell could identify the individuals that he saw on the evening in question. Lt. Shemwell testified,

> I had an investigator in my office get with the F.B.I. agent, who was assigned, had already opened a case with the F.B.I. office, regarding the DNA evidence, to contact the Hawaii office. Sent them all photographs of everyone that we have

> compiled through crime stoppers, T.F. & N. information. I think it's something like 50 something photographs. Sent them out to the agent in Hawaii to meet with Mr. Darnell. He viewed the photospread.

Defense Counsel asked Shemwell if Darnell could "identify anyone as being one of the individuals that he observed in the hotel on the evening in question." To which Shemwell replied, "he could not identify anyone, no." Shemwell testified that petitioner's photograph was included in the group of photos that were sent to Hawaii. Shemwell was asked if this information was presented to the jury at petitioner's original trial. An objection was raised by the State and sustained by the court. Finally, Shemwell testified that, as the coordinator on this case, he was the person responsible for meeting with the D.A.'s office and discussing the evidence that the investigation has uncovered.

B. James Darnell's Statement[25]

A copy of James Darnell's statement to police dated February 13, 1997 and prepared by Sgt. R.F. Wilkinson and Sgt. J. Botting was submitted by petitioner in support of his motion. The bottom right corner of the document contains the following batestamp, "Rimmer DA File: 2004186." Darnell told police that he went to the Memphis Inn on Macon Road on February 13, 1997 between 1:30 a.m. and 2:30 a.m. He stated that after arriving at the Memphis Inn he got out of his car and noticed a man to the left behind a car with the trunk open. Darnell told police that he walked towards the night clerk lobby and the man followed him. He stated he opened the door and "invited him in first," then "followed him into the lobby." Darnell stated that he walked towards the clerk's window; and, at that point, he realized that both the clerk and the man

[25] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, Attachment 4, page A-330-31.

that followed in the hotel were bleeding from their knuckles. Darnell stated that "the clerk then proceeded to put money under the window towards the other man. The other man was talking to the clerk. He seemed inebriated." Darnell stated that the door to the main lobby was open and he turned around and walked out, got in his car, and, told his friend, Dixie, that "something was wrong inside," and they should go somewhere else. Darnell told police that the man on the inside of the window was handing the other man both coins and dollar bills. He stated that his intuition made him leave "because both men were bleeding, the door to the night clerk's office was open . . . the man was drunk." Darnell stated he was in the motel for no more than five minutes.

Darnell provided the following description of the white male that he followed into the motel:

> M/W, mid-20's, 5'6", 150 lbs., mustache, neck-length, light red hair, freckles on his left forearm, orange and white baseball cap, white t-shirt with torn left sleeve, blue jeans, tennis shoes I believe, wristwatch on left arm.

He stated that the man's right hand was bleeding and it looked like he might need stitches. Darnell described the man behind the clerk's window as being a:

> White/Male, mid-30's, 5'7", 160 lbs., collar length brown hair, thin mustache, dark blue jacket, I'd say black collared shirt under the jacket (jacket was buttoned all the way up to the second button), he was bleeding from the knuckles on his left hand, kind of pale skin tone.

Darnell stated that he got a very good look at the individual he thought to be the clerk. The statement is signed by James M. Darnell, Jr.

C. Stewart 5-30-97 Supplement[26]

At the hearing on petitioner's motion to disqualify, petitioner offered, in support of his motion, what purports to be a police supplement prepared by Sgt. O.W. Stewart at 1:30 a.m. on 5-30-97. The heading of the document reads "Supsect #2 Identified/Voyles." The relevant portions of the documents content are as follows:

> Sgt. O.W. Stewart, 7927 received a phone call from Sgt. R.D. Rolcson, SSTF,[27] regarding a communiqué from Peter H. Lee, Honolulu, FBI. This writer was informed that a positive identification had been made by a Sergeant James M. Darnell, witness, identifying the male white that he saw at the Memphis Inn on Macon Road on the night of Febraury 8, 1997, as he entered to rent a room and this male white followed him into the motel and this male white had what appeared to be blood on his knuckles. This identification was made from photo spread "AA" and the photograph identified was in position #5. The person in this photograph had been identified as Billy Wayne Voyles, Jr., DOB: 7-27-97, H/A 6942 Tobin Dr, Bartlett, TN.
>
> Sgt O.W. Stewart pulled the B of I file #92849 from the Shelby County Records and Identification section as Sgt. T. Heldorfer did a warrant check on the above individual. Records indicate that Billy Wayne Voyles, DOB: 7-27-64, was arrested on 1-28-95 on aggravated robbery after he picked up male white from the sweet's four wheel lounge and while attempting to rob this male white, Billy Voyles stabbed this male white. This incident was filed under an assault report #950107328. Billy Wayne Voyles, Jr. was released on a $35,000.00 bond after being held to the state in General Sessions Court. Billy Voyles never returned to court and a capias warrant was issued for Billy Wayne Voyles, Jr., for the charge of Criminal Attempt, to wit: Especially Aggravated Robbery and Criminal Attempt, to wit: Murder First Degree on Indictment #95-04149 and Warrant #96087008.
>
> . . . . Officer Glenn was advised of the current warrant on Billy Wayne Voyles, Jr. and advised him that this Dept. would ascertain from the Attorney General's Office if extradition would be authorized and to have the warrant placed in the N.C.I.C. and requested officer Glenn to attempt to locate this subject for the Memphis P.D. . . . .

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[26] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, Attachment 3, page A-327.

[27] SSTF is the police abbreviation for the joint federal and state "Safe Streets Task Force."

Asst. A.G. Tom Henderson was notified of this development and he came to the homicide office and after a consultation he authorized extradition and sent this authorization to the fugitive squad for entry into the N.C.I.C. [28]

D. Testimony presented during post conviction Motion for Discovery

Post conviction counsel filed a motion seeking assistance with discovery of various items in the control of the federal government and other items whose whereabouts are unknown. The following testimony presented at that hearing was included in the evidence submitted by petitioner in support of his motion to disqualify and is relevant to this court's determination of that issue.

1. Criminal Court Clerk, Carl Townsend

On September 21, 2009, a hearing on petitioner's motion for discovery of exculpatory evidence was held in this court. Carl Townsend testified that he works in the Criminal Court Property Room. He stated that the property room maintains evidence introduced in criminal trials and "residual" evidence that is gathered in the course of an investigation; but, not introduced at trial. Townsend testified that he was asked by post conviction counsel to gather certain items related to the case of State v. Michael Rimmer. He stated that the items were part of the "residual" items maintained in the case. He stated that items maintained by the Criminal Clerk's Property Room are typically checked into the property room by someone from the City Property Room. Townsend identified an envelope labeled "signed photospreads, vehicle/weapon

[28] It is not clear where this document came from. The court notes that other documents attached to petitioner's motion, including the discovery provided to defense counsel bear the Shelby County District Attorney General's unique bate-stamp. This document purports to be a summary done by Sgt. Stewart, yet it does not contain the same numbering as other supplements prepared by the officers in the case. This could mean that the document was provided to the State; but, was not placed in the file either purposefully or mistakenly. It might also imply Sgt. Stewart failed to place the supplement in the file either purposefully or mistakenly. This court has no way of knowing the answer to that question. As previously noted, Henderson did not testify at the hearing on petitioner's motion to disqualify.

photo, and drawing." He stated that the items were obtained from Box 3 in the case of State v. Michael Rimmer. Within the envelope, Townsend located a document with the date June 24, 1997 with the name James W. Darnell. He testified that the document indicated Darnell identified photograph number 5 from sheet AA. In regards to the documents contents, Townsend testified, "on a FD302 dated 5/20/97 Darnell advised that on 2/8/97 he opened the door in the motel front desk office and let No. 5 into the front desk area ahead of him." He further testified that Darnell indicated "No. 5 smelled of alcohol and appeared to be intoxicated," and "5 had blood on his knuckles."

Townsend testified that the envelope also contained a photospread labeled AA and testified that the back of the AA photospread contained the signature of James Darnell and the date of June 21, 1997. Townsend further identified a white piece of paper with the heading, "United States Department of Justice, Federal Bureau of Investigation." He indicated that the document was a receipt for property received, returned, released or seized on July 22, 1997. Townsend testified that the receipt indicated that the documents were released to Seargeant R.L. Shemwell of the Memphis Police Department. He stated that Sgt. Roleson's name was also on the receipt. He stated the receipt indicated that four laser photos of a Honda and seven laser photo lineups were released.

2. Sgt. Richard Roleson

Richard Roleson testified that he was formerly employed by the Memphis Police Department. He testified that he worked on the murder of Ricky Ellsworth as part of the F.B.I.'s Safe Streets Task Force (SSTF). Roleson was shown a document from the Memphis Police Department's files titled, "Sergeant O.W. Stewart 7927; suspect No. 2 identified/Voyles,

5/30/97." He stated that the document was a "supplement report." He indicated that the first paragraph of the document stated,

> . . . . Sergeant O.W. Steward 7927, received a phone call from Sergeant R.D. Roleson, SSTF regarding a communique . . . . from Peter H. Lee, Honolulu F.B.I.. This writer was informed that a positive identification had been made by a Sergeant James M. Darnell, witness, identifying the male white that he saw at the Memphis Inn on Macon Road on the night of February 8, 1997, as he entered to rent a room, and this male white followed him in to the motel, and this male white had what appeared to be blood on his knuckles. This identification was made from photospread AA, and the photograph identified was in position 5. The person in the photograph has been identified as Billy Wayne Voyles, Jr., date of birth 7/27/97.

Roleson testified that he thought he received this information through an F.B.I. 302, or investigative report. He stated that after receiving this type of communication from the F.B.I., the document would go into the F.B.I. files. He stated that he relayed this information to Sgt. Stewart; but, could not recall the exact date. The following exchange between petitioner's post conviction counsel and Roleson occurred regarding the photographic lineup:

Question: Okay. And the previously introduced Exhibit 2 before this court in this hearing contains a document indicating that you received four laser photos of a 1988 Honda and seven laser photos of lineups from the F.B.I., and released them to Sergeant Shemwell on 7/22/97, if the document indicates that would you have any question that that is what occurred?

Answer: Did I receive from the FBI?

Question: Yes.

Answer: Well, I probably received from Shemwell and then sent them off to the agency that showed them and then they come back to me and I gave it back to Shemwell or whoever the case coordinator was.

Question: And – okay. If the identification occurred in May and then again in June and then we're talking July that would make sense for the time frame as to when you received back the photo lineups then provided it to Shemwell, is that correct?

Answer: Yes Ma'am.

Question: Okay. As a member of the Task Force did you have any meetings with the United States District Attorney's Office here in Memphis?

Answer: I had plenty of meetings with them.

Question: Do you recall any specific meetings in this case?

Answer: I don't recall in this case.

Question: Do you recall any - - being at any meetings with Assistant District Attorney General Tom Henderson or Assistant U.S. Attorney John Fowlkes regarding the investigation of Ricky Ellsworth?

Answer: I don't recall but if it's documented I probably did.

Question: Okay. And the case agents that were working with you from the F.B.I. in this case was that Drew Northern and Jennifer Eakin?

Answer: What was the first name?

Question: Drew Northern.

. . . .

Answer: I don't recognize that name.

Question: Okay. Do you recognize the name Jennifer Eakin?

Answer: Yes Ma'am.

Following counsel's direct examination, this court asked Roleson about his role on the Safe Streets Task Force and Roleson stated that in petitioner's case, because the witness was in the military and stationed in Hawaii, he was asked to contact the Hawaii F.B.I. field Agent and ask him to show the witness the photospread. He stated that the Agent then sent the photspread back to him.

3. Robert Shemwell

Colonel Robert Shemwell testified that he was the case coordinator on the Ricky Ellsworth murder investigation. He stated that, at some point in the investigation, he contacted Sgt. Roleson to request the assistance of the Safe Streets Task Force. He stated that he needed to show photospreads to a military individual who was stationed in Hawaii. Shemwell testified that once you contact the SSTF they "open up a case file" and "assign a number to it." However, he stated that he did not believe the Federal government was actively involved in the investigation. Shemwell was asked if he was aware that Assistant U.S. Attorneys John Fowlkes and Tony Arvin were investigating the case and meeting with the District Attorney's Office. He stated that he "met with both of them in regards to the case" and to his knowledge "there was no investigation on their part." He stated that he reviewed the case for consideration of Federal prosecution. However, Shemwell testified that his involvement with the federal government was to present them with "what we had."

Shemwell acknowelged that the U.S. Attorneys' Office eventually decided they would coordinate a joint prosecution. However, he stated that he was not involved in that process. Shemwell testified that the prosecutor, Tom Henderson, was the one working with the U.S. Attorney's Office. Shemwell identified a supplement that was prepared outlining James Darnell's statement regarding the two men he observed in the motel on the night in question. Shemwell also identified a supplement that he prepared on Februrary 13, 1997. He stated that the supplement indicated that on February 13, 1997, Darnell came to the office and Sergeants Botting and Wilkinson were assigned to take Darnell's statement. Shemwell further identified the statement given by Darnell.

Shemwell testified that Darnell assisted officers in developing a composite sketch of the two men he witnessed in the motel. He stated that the sketches were distributed to local television stations and were shown in the local newspaper. He identified copies of the composite sketches, dated February 28, 1997. He stated that the originals should have been tagged into the evidence room. Shemwell testified that Darnell did not describe either man as bald or balding or as having short hair. Shemwell acknowledged that when he first encountered petitioner, petitioner was balding and the remainder of his hair was "very trim."

Shemwell testified that after releasing the composite drawings, officers received a call from an Arkansas State Trooper. He stated that the trooper had received information from an individual who claimed the men in the composite drawing were Billy Voyles and Raymond Cecil, Jr. Shemwell testified that photographs of Volyes were pulled to use in a photospread of potential suspects. He could not recall whether a photograph of Raymond Cecil was included in the photospread. Thereafter the following exchange between petitioner's post conviction counsel and Shemwell occurred:

Question: We've seen some photo lineups that have already been introduced, AA through GG. If I wanted to know who those people were in the photographs how would I go about finding out, who would know?

Answer: Should be a master photospread that has the names or their booking number that could be tracked back to them, and it should possibly be in one of my supplements of each picture of each person - -

Question: Would you have that?

Answer: Who everyone is?

Question: If it's not contained in the Memphis Police Department files kept by the custodian is there any reason it's not there? . . . . Why it would not be there.

Answer: . . . . I have no idea. . . . . I turned in all the original documents to the State for prosecution. I made a copy of it in the homicide case file but it should be a duplicate of that the State was given.

Question: . . . . Do you recall whether you turned over your entire case file to Ruth Murray, the custodian?

Answer: I - - what I do is I tag all the evidence in the evidence package the photospreads and all that, that would be in one envelope and it should have its own property receipt number. The whole case file, copies of the original property receipt numbers would be in that original case file, and it should list what each piece of evidence was.

Shemwell was shown another document titled, "Sergeant O.W. Stewart 7927, suspect No. 2 identified Voyles 5/30/97." Shemwell stated that the document seemed to be a supplement from the police file. He stated that the document indicated Sgt. Roleson received information that a suspect had been identified from one of the photo lineups. He stated that the person identified was Billy Wayne Voleys. He stated that an investigation into Voyles revealed that Voyles had an outstanding capias warrant in Shelby County relating to charges of robbery and attempted murder. He stated that a warrant for Voyles arrest was issued. Shemewell testified that the document indicated Henderson was notified of this development. Shemwell testified that Henderson was "involved in just about every step of this case." He stated that Henderson authorized the extradition of Voyles. Shemwell testified that he did not recall what happened with Voyles' pending charges.

Shemwell testified that he could not recall whether Darnell testified at either petitioner's original trial or his resentencing. However, he stated that he was not asked by Henderson to attempt to locate Darnell for trial. He stated that, during petitioner's original trial, he was on the stand for six and a half hours and could not recall whether he was asked about James Darnell. With regard to the resentencing, he stated that he recalled being asked to review the file during a lunch break. However, Shemwell testified that "I know we didn't review the whole case because

it was a real thick case and it wouldn't have been - - we wouldn't have been able to review it at a lunch break. . . . . I'm sure we were looking for specific questions that kind of came up." Post conviction counsel stated that the police filed she received from the Memphis Police Department was approximately 290 pages and asked Shemwell if the file was larger than that. Shemwell replied that the file was "a lot larger" and stated he had no idea why the entire file was not provided to counsel. Counsel stated, "[a]nd Mr. Henderson was aware that Darnell had identified Billy Wayne Voyles because you had told him and he had authorized his extradition, correct?" To which Shemwell replied, "that's correct." He stated that he did not withhold any information from Henderson. He further stated there were no reports, documents or evidence which he "deliberately" did not preserve.

Shemwell testified that he could not recall what his answer was at the resentencing hearing in response to counsel's question regarding whether Darnell had identified anyone. He stated that the resentencing occurred a number of years after the offense and stated that he likely forgot that Darnell had identified someone. Shemwell stated that fifty-one photographs were compiled for the photspread. He stated that officers received numerous tips. Shemwell further testified that Voyles was never charged in association with the victim's murder. He stated that there was no evidence to prove that Voyles was involved in the victim's murder. Shemwell testified that petitioner was charged with the offense because the physical evidence pointed to him as the perpetrator. He stated that blood was recovered from the vehicle that petitioner was stopped in and that blood matched the blood from the scene and was later "matched maternally to the victim." He further testified that petitioner had earlier indicated he was going to kill the victim.

In their argument regarding the motion to compel discovery of exculpatory evidence, post conviction counsel made the following statements:

> The U.S. Attorney has yet to respond to our Freedom of Information Act request other than to acknowledge it and indicate to us that they are searching their files. But one of the reasons, Your Honor, I think today was productive hopefully was to indicate specifically the type of information that we're looking for, given that the current prosecutor, Mr. Campbell, was not the Trial Prosecutor of the case.

And we're talking apparently about a homicide police file that we only have 290 pages of, yet we know there are pieces of it that should have been there that show up in the DA's file which is several thousands of pages. And there's additional information that I do not know where it's at. The original composite sketches which Officer Shemwell indicated should be somewhere, we do not have from either the DA's file or the police file.

E. Federal Bureau of Investigation Communications

During petitioner's hearing on his post conviction motion to compel discovery, counsel for petitioner submitted several documents purporting to contain communications between Agents of the Federal Bureau of Investigation and members of the Tennessee Safe Streets Task Force (SSTF); communications between F.B.I. Agents and SSTF representatives and Assistant U.S. Attorneys; and/or, communications between the F.B.I., SSTF, U.S Attorneys and the Shelby County Assistant District Attorney General, Tom Henderson. The relevant content of such documents is set out below.

1. FD-302, Federal Bureau of Investigation Report dated 5/21/97[29]

A document identified as a F.B.I. FD-302 supplemental report was introduced during the hearing on petitioner's motion to compel discovery. The document relates to the photo identification made by Darnell. Darnell's name and social security number have been redacted from the document. The document is dated May 21, 1997 and indicates it originated in the Honolulu F.B.I. field office. The signature of the Agent who created the document has also been redacted. The redacted document reads as follows:

> On May 20, 1997, _____, Social Security Number _____, _____, Hawaii, work telephone number _____ was advised of the identity of the interviewing agent and the nature of the interview. _____ provided the following information:
>
> Agent _____ showed _____ four photographs of a maroon Honda Accord suspected of being present in the parking lot of the Memphis Inn East, located at 6050 Macon Cove, Memphis, Tennessee on the morning of 02/08/1997. _____ advised that he could possibly identify the Honda Accord from the midsection of the car to the rearend.
>
> In addition _____ reviewed seven photographic lineups identified as the following: #AA, #BB, #CC, #DD, #EE, #FF, and #GG. _____ positively identified only one photograph 02/08/1997, he opened the door to the motel front desk office and let "5" into the front desk area ahead of him. _____stated that "5" smelled of alcohol and appeared to be intoxicated. _____ advised that "5" had blood on his knuckles.

A cover page dated 5/22/1997 indicates that the FD-302 form as outlined above was sent to a SSTF (Safe Streets Task Force) representative in Memphis and was placed in the F.B.I. filed on May 29, 1997 under case number 7A-ME-51176.[30]

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[29] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, page A-520.

[30] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, page A-522.

2. Federal Bureau of Investigation Document dated 06/09/1997[31]

A document from the Federal Bureau of Investigation dated 06/09/1997 indicates that a representative from the SSTF sent additional correspondence to the Honolulu F.B.I. Agent who initially showed Darnell the photospreads. The redacted document reads:

> Photo spreads are being returned to Honolulu so witness may initial the photograph of the individual he picked out of the photographic spread. . . . .
>
> Seven photographic line-ups and four photographs of a Honda Accord vehicle. . . . .
>
> Enclosed items were previously forwarded to Honolulu on Serial 8 so that _____ could view the photographs for possible identification of captioned subject. The FD-302 of _____ dated 5-20-97, indicates that _____ picked out individual #5 from photographic sheet #AA. _____ did not initial or date the photo spread on which he made the identification. Consultation with the both [sic] the United States Attorney's Office and the Attorney General's Office, who are both contemplating bringing charges in this matter, indicates a need for _____ to physically initial and date the photograph he picked out of the line-up to preclude any future problems at trial.

This document also contains the case number 7A-ME-51176.

3. Federal Bureau of Investigation Document dated 06/24/1997[32]

It appears that on June 24, 1997, the following FD-302 was completed by an F.B.I. Agent in Honolulu, Hawaii in response to the Safe Streets Task Force's 6/9/1997 communication requesting Darnell sign the photo which he had previously identified:

> On June 21, 1997, _____, Social Security Number _____, _____, Hawaii, work telephone number _____ was advised of the identity of the

[31] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, page A-524.

[32] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, page A-527.

interviewing agent and the nature of the interview. _____ provided the following information:

_____ was shown the photographic lineup provided by the Memphis, Tennessee, SSTF. He identified one photograph from sheet "AA" numbered "5." _____ dated, initialed, and signed the back of the photograph. On a FD-302 dated 5/20/1007, _____ advised that on 02/08/1997, he opened the door to the motel front desk office and let "5" into the front desk area ahead of him. _____ stated that "5" smelled of alcohol and appeared to be intoxicated. _____ advised that "5" had blood on his knuckles.

Again, the document was redacted, removing Darnell's name and personal information and the name of the Honolulu agent.

4. Federal Bureau of Investigation Document Dated 7/28/97. [33]

An additional federal FD-302 supplement dated 7/28/97 was submitted by counsel. This redacted document also contained the case number 7A-ME-51176 and the following content:

On July 21, 1997 _____ checked out of the Memphis FEDERAL BUREAU OF INVESTIGATION bulky storage the four laser photos of a 1988 Honda and seven laser photo line ups which had been sent to Hawaii and returned. These 11 photographs were then taken to the MEMPHIS POLICE DEPARTMENT Homicide Division, 201 Poplar Avenue, Room 1121, and released to _____ Form FD-597 was filled out and signed by _____ and _____.

Form FD-597 will be retained in a 1A envelope.

[33] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, Exhibit page A-531.

5. Federal Bureau of Investigation Document Dated 8/15/1997[34]

The following was communicated on 8/15/97 in a document purportedly from a Special Agent of the Memphis office of the F.B.I.:

> On 8/12/97, SA _____ and TFO _____ met with AUSA's Tony Arvin and John Fowlkes re captioned matter. AUSA John Fowlkes advised he would pursue prosecution of RIMMER utilizing the "three strikes" provision of the law and charging him with Hobbs Act Robbery provided the facts supported the charge. AUSA Fowlkes advised he would contact the DA's office to coordinate the joint prosecution. AUSA Fowlkes also requested a complete report containing summary, witness statements, photographs and case reports.

The document contained the case number 7A-ME-51176.

F. Commissioner Gibbons Deposition

Former Shelby County District Attorney General, William Gibbons testified at a deposition taken on March 10, 2011.[35] Gibbons testified that the Shelby County District Attorney General's Office employs between eighty and one hundred lawyers. Gibbons testified that during his approximately fourteen years as Shelby County District Attorney General, he approved every filing made by the office regarding the state's notice of its intention to seek the death penalty in a first degree murder case. He testified that during his tenure the office handled over a million cases. He stated that the office encourages a policy of open file discovery. He indicated that the office mandated discovery as was required under the Rules of evidence and criminal procedure; however, he stated that the level of open file discovery beyond what the rules require was left to each individual prosecutor.

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[34] See Petitioner's Rule 9 Application for Permission to Appeal to the Tennessee Supreme Court this court's denial of his Motion to Disqualify the Shelby County District Attorney General's Office, Volume 3 of Attachments, Exhibit 13, page A-535.

[35] Gibbons is currently the Commissioner of the Tennessee Department of Safety and Homeland Security.

With regard to Assistant District Attorney General Tom Henderson, Gibbons testified that beginning in 1998 Henderson was assigned to the major crimes or violent crimes unit. Gibbons testified that in 2000 Henderson was promoted and began reporting directly to him. He stated that thereafter, in September of 2006, Henderson was again promoted and given the responsibility for training new lawyers in the office.

Gibbons testified that he was aware of certain cases in which allegations of *Brady* violations had been made against Henderson. However, he stated that he was never made aware of any instance in which Henderson knowingly withheld exculpatory evidence or intentionally violated the rules of professional conduct or the rules of discovery. Gibbons testified that he was aware of the allegations against Henderson in the instant case and indicated that he did not believe Henderson intentionally withheld exculpatory evidence. He further stated that, regarding Officer's Shemwell's testimony, that he believed the testimony at trial established that Shemwell simply made a mistake when testifying about Darnell's identification. Gibbons testified that he had no reason to believe that Henderson was untruthful with the court when he stated that he had reviewed the file and found no signed photo array and no supplement outlining Darnell's identification of Voyles. Gibbons stated that he found Henderson to be a prosecutor with extremely high ethical standards.

Gibbons testified that he was aware that Darnell had made an identification; but, stated that he did not recall who Darnell had identified, did not recall if Darnell was shown petitioner's photograph, and did not recall Darnell signing the photo array. Gibbons further testified that he did not recall that there was a police supplement outlining the results of the photo array shown to Darnell and stated that he could not recall if he had discussions about this case with the United States Attorney's Office. Gibbons testified that based upon his review of the trial testimony, the

petitioner's motion to disqualify and attachments to said motion, and discussions with Assistant District Attorney John Campbell he approved the decision to challenge the motion to disqualify.

***Brady* Violations**

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. See also State v. Ferguson, 2 S.W.3d 912, 915 (Tenn. 1999). Johnson v. State, 38 S.W.3d 53, 55-56 (Tenn. 2001). In order to establish a due process violation under Brady, four prerequisites must be met:

1. The defendant must have requested the information

(unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not);

2. The State must have suppressed the information;

3. The information must have been favorable to the accused; and

4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995); see also State v. Evans, 838 S.W.2d 185 (Tenn. 1992). Evidence that is "favorable to the accused" includes evidence that is deemed to be exculpatory in nature and evidence that could be used to impeach the State's witnesses. State v. Walker, 910 S.W.2d 381, 389 (Tenn. 1995); State v. Copeland, 983 S.W.2d 703, 706 (Tenn.

Crim. App. 1998); see also United States v. Bagley, 473 U.S. 667, 676 (1985). "Favorable" evidence

> may consist of evidence that could exonerate the accused, corroborate the accused's position in asserting his innocence, or possess favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim.

Johnson, 38 S.W.3d at 55-56, (quoting, Marshal, 845 S.W.2d at 233)). The Court in Johnson described "material" evidence in the following manner:

> Evidence is deemed to be material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995); see also State v. Walker, 910 S.W.2d 381, 389 (Tenn. 1995); State v. Copeland, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998). Despite the language of probabilities used in our cases, however, it must be emphasized that the test of materiality is not whether the defendant would more likely than not have received a different verdict had the evidence been disclosed. See Strickler v. Greene, 527 U.S. 263, 275, 144 L.Ed.2d 286, 119 S.Ct. 1936 (1999). Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that we may affirm a conviction or sentence when, 'after discounting inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions.' Id.; Kyles v. Whitley, 514 U.S. 419, 435 n.8, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995). . . . . Instead, a reviewing court must determine whether the defendant has shown that 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict.' Irick v. State, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998) (citing Edgin, 902 S.W.2d at 390); see also Strickler, 527 U.S. at 290. In other words, evidence is material when, because of its absence, the defendant failed to receive a fair trial, 'understood as a trial resulting in a verdict worthy of confidence.' Kyles, 514 U.S. at 434.

The "prosecution is not required to disclose information that the accused already possesses or is able to obtain." State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). Although the State is not obligated to disclose the entirety of the investigatory police work in a case, the State is required to disclose all favorable evidence obtained by or known to any person acting on the government's behalf, including the police. See Moore v. Illinois, 408

U.S. 786, 795 (1972); See also Strickler v. Greene, 527 U.S. 263, 275 n.12 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1995). Favorable information must be disclosed regardless of whether the state believes it to be credible. Johnson v. State, 38 S.W.3d at 55 (Tenn. 2001). The "prosecution's duty to disclose is not limited in scope to 'competent evidence' or 'admissible evidence.'" State v. Marshall, 845 S.W.2d at 232.

ANALYSIS

For the reasons set forth below, this court finds that Shelby County Assistant District Attorney General Tom Henderson should be precluded from assisting the Shelby County District Attorney General's office in its representation of the state's interest during petitioner's post conviction proceedings. This court finds Henderson is precluded from such representation due to the fact that he may very well become a witness at petitioner's post conviction hearing.[36] Such a finding would ordinarily preclude the need for a determination of whether a conflict of interest or appearance of impropriety also warrants the disqualification of counsel. In the instant case, because petitioner asserts that entire Shelby County District Attorney General's Office should be disqualified based upon such a conflict applying to General Henderson, this court must nevertheless address such allegation. For the reasons set forth below, this court finds no conflict of interest necessitating counsel's removal. However, the court does find that the potential

[36] For the reasons set forth below Henderson may not participate as an advocate for the State. Thus, he will not be allowed to participate in the hearing other than as a potential witness; and, he is precluded from directing the actions of other attorneys working on the case and from making strategic decisions regarding the State's representation. He may however, participate in every way that witness would be allowed to participate, including; but, not limited to providing the State's representatives with relevant information about his participation in petitioner's original trial and resentencing proceedings.

appearance of impropriety would warrant General Henderson's disqualification. Conversely, for the reasons set forth below, this court does not find that the entire Shelby County District Attorney General's Office, in particular Mr. Campbell, must be precluded from representing the state at petitioner's post conviction proceedings.

I. Assistant District Attorney General Henderson

Based upon Mr. Pera's assertion that the rules of professional conduct require this court, in determining whether disqualification is warranted, to review the validity of the allegations against counsel, this court makes the following findings:[37]

Initially this court notes that post conviction counsel did not present testimony from General Henderson, petitioner's original trial counsel; initially assigned resentencing counsel; or attorney's Coleman and Springer, who subsequently represented petitioner at resentencing. Moreover, only limited portions of petitioner's original trial materials or testimony was presented for this court's review. Therefore, this court makes no findings regarding allegations that General Henderson committed *Brady* violations at petitioner's original trial. This court finds petitioner has simply failed to provide any evidence in support of their allegation that the material in question was not provided to petitioner's original trial counsel. Therefore, this court

[37] This court notes that these findings are based upon the limited proof presented at the hearing on this matter. Certainly this court anticipates that additional proof regarding the allegations of prosecutorial misconduct will be presented at the hearing on petitioner's post conviction claims. Thus, this court cautions that its findings with regard to those matters today in no way addresses the merits of petitioner's underlying post conviction claims. Rather, as suggested by Mr. Pera, this court makes such determinations as the starting point for its analysis of the disqualification issue and such findings are binding only in so much as they address the issue of disqualification.

will only address the issue of disqualification as it relates to allegations of misconduct during petitioner's resentencing proceedings.

Based upon the limited proof before this court, it appears that a *Brady* violation likely occurred during petitioner's resentencing proceedings. This court likewise finds that, although apparently inadvertent, Office Shemwell provided false testimony during petitioner's resentencing proceeding. This court further finds, again based merely on the limited proof before this court, that General Henderson knew; or, at the very least, should have known Officer Shemwell's testimony was false. However, contrary to petitioner's assertions and Mr. Pera's testimony, this court is unable to conclude that General Henderson acted with nefarious purposes.[38] Moreover, this court finds the materiality of the evidence which General Henderson failed to provide and which, due to Officer Shemwell's false statements, the jury failed to hear was marginal in the context of petitioner's resentencing. Certainly, as noted above, the court may very well reach a different conclusion upon review of the entire body of proof presented in support of these allegations at the post conviction hearing. However, for purposes of evaluating the alleged conflict, this court finds the likelihood of success on this issue at the post conviction hearing is questionable. Such a conclusion, as Mr. Pera suggested in his testimony, is important to this court's determination of whether a conflict of interest exists.

This court finds that the evidence of the identification of Voyles by witness James Darnell was "favorable" to the petitioner and should have been provided to counsel pretrial. Based upon the jury out exchange that occurred during the testimony of Officer Shemwell at petitioner's resentencing hearing, this court accepts for purposes of evaluating the

[38] Although for purposes of evaluating petitioner's due process rights under *Brady*, it is irrelevant whether such information was inadvertently withheld or whether the failure to disclose was the result of bad faith on the part of the prosecution, this court finds, for purposes of evaluating whether disqualification of the prosecutor is warranted, the bad faith of the prosecutor is particularly relevant.

disqualification question only, that petitioner's resentencing counsel were not provided the Darnell photo array. While his court acknowleges that, given that petitioner had already been convicted, the "exculpatory" or "favorable" nature of such proof may not have been readily apparent to General Henderson prior to the start of the resentencing proceedings; this court finds, once it became clear that resentencing counsel intended to pursue a mitigation theory based upon residual doubt, General Henderson had an obligation to turn over the Darnell photo array.[39] Under *Brady* and its progeny, a defendant is entitled to all material which may be "favorable" either to guilt or to punishment. Evidence that a witness had identified another potential perpetrator may have been "favorable" to punishment under a theory of residual doubt.

This court finds that, the evidence, while not conclusive, does suggest that Henderson was informed of the Darnell photo array identification prior to petitioner's original trial. Seargeant. Stewart's supplement dated May 30, 1997 indicates that Stewart notified Henderson that Darnell had identified Voyles. While it is not entirely clear that the noted communication between Stewart and Henderson related to the actual photo spread identification of Voyles by Darnell and not the prior crime stoppers tip relating to Voyles, this court finds that the reasonable inference from the document is that Stewart informed Henderson that Darnell had made a photo identification of Voyles and that Stewart was requesting Henderson initiated extradition proceedings against Voyles based upon Darnell's identification. Additionally, it appears that sometime prior to June 9, 1997, both Henderson and a representative from the United States Attorney's Office instructed officers that Darnell needed to initial and date the photo array

[39] The question regarding the "exculpatory" or "favorable" nature of the composite sketch prepared by law enforcement, which was based upon Darnell's description of the two men he observed in the lobby on the night in question, as it relates to a theory of residual doubt is not as clear. Moreover, it appears the sketches were released to the media; and both original trial counsel and resentencing counsel were aware of the sketches prior to trial. However, regardless of their exculpatory value, this court need not address the sketches at this time as the court has concluded, based upon the alleged *Brady* violation associated with General Henderson's failure to turn over the Darnell photo array, that General Henderson should be disqualified from representing the State at petitioner's post conviction hearing.

identifying Voyles as the individual he saw at the motel on the night of the murder. Thus, it appears that prior to June 1997, Henderson was aware that Darnell had identified Voyles through a photo array. These documents support Shemwell's assertion at the hearing on the post conviction motion for discovery that he informed Henderson about every action taken in the case. Thus, from the evidence currently before the court, it does appear Henderson knew Darnell had identified Voyles and that the identification was made from a photo array.

Whether Henderson was in possession of the actual signed photo array and the supplement prepared by Sgt. Stewart is inconsequential. This court does have some question whether the F.B.I. reports outlining the results of the Darnell interview, in which he was shown the photo array and identified Voyles as the man he saw outside of the clerk's window, were ever in the actual physical possession of the Shelby County District Attorney's Office. This court notes that Sgt. Roleson, with the joint federal and state Safe Street Task Force coordinated the showing of the photo array to Darnell with the Honolulu, F.B.I. field agent. The communications regarding the results were all generated by federal agents and apparently made a part of the F.B.I. file. Clearly, the United States Attorney's office was contemplating federal prosecution in the case and had requested all statements and photographs be provided to them. However, it does appear that, at least from July 21, 1997 to August 15, 1997, the photo array signed by Darnell was likely in the possession of the Memphis Police Department's Property Room. Moreover, the signed photo array was subsequently located in the Shelby County Criminal Court Clerk's office as part of the "residual" evidence associated with petitioner's resentencing proceedings. Nevertheless, whether the F.B.I., the U.S. Attorney's Office or the Memphis Police Department maintained the documents in question, attorney Henderson was under an obligation to provide the documents to counsel.

Although petitioner's re-sentencing counsel did not testify at the motion to disqualify, based upon the portion of the re-sentencing transcript submitted for this court's review, it does not appear that petitioner's re-sentencing counsel were provided this information. Clearly counsel was aware that Darnell had been shown a photo array of potential suspects and was unable to positively identify petitioner as one of the individuals he saw on the evening in question. However, counsel apparently was never made aware that Darnell had identified another individual from the photo array. Rather, Lt. Shemwell testified that Darnell was not able to positively identify anyone from the photo array and further informed counsel that he had reviewed the file and found no information relating to the interview in which Darnell was provided the photo array and asked if he could make an identification of the individuals he saw on the night in question. This assertion was supported by Mr. Henderson's statements that he too had reviewed the file and found no information relating to the results of the photo array shown to Darnell.

This court accepts Lt. Shemwell's assertion that he was merely mistaken when he stated that Darnell was not able to identify anyone from the photo array. As Shemwell indicated the re-sentencing of petitioner took place several years after the offense. It is reasonable to assume that he simply forgot Darnell identified Voyles. Officers had received information about Voyles possible involvement in the case prior to Darnell identifying Voyles. At the time that Darnell made the identification it appears officers were already trying to locate Voyles. Subsequent investigation revealed that Voyles could not be linked to the crime and substantial evidence was developed linking petitioner to the murder of the victim. Thus, it is possible that both Shemwell and Henderson found Darnell's photo identification of Voyles to be of little consequence to the

case; and, thus, he could not recall several years later that Darnell had made such an identification.

Moreover, it appears that the court took a recess in excess of two hours in order to allow Shemwell and Henderson to review the case file in order to determine if any additional supplements or evidence existed relating to the photo array shown to Darnell. In particular, Shemwell reviewed the file to determine if any evidence existed that outlined any results associated with the interview in which Darnell was shown the photo array of potential suspects. As noted above, the federal government had opened its own investigation in this case and the F.B.I. was responsible for showing Darnell the photo array and recording his response. Thus, it is unclear that the evidence in question was in the file reviewed by Shemwell and Henderson. While this fact does not change Henderson's responsibility to turn the evidence over to the defense, it does lend credibility to Shemwell's assertion that he did not find any such evidence in the file.

This court finds Henderson likewise mistakenly informed the court that no such identification existed. As discussed above, like Shemwell, it appears that at some point Henderson was made aware that Darnell had identified Voyles from the photo array shown to him by F.B.I. Agents in Hawaii. However, the re-sentencing occurred some years after the initial conviction and since guilt and innocence was not the focus of that proceeding, it is possible Henderson did not recall that Darnell had identified Voyles. At the resentencing hearing, Henderson stressed that defense counsel had been provided all of the crime stopper tips. It is possible that he mistakenly recalled Voyles having been identified as a potential suspect only through the crime stoppers tip and not through the photo identification provided by Darnell. There simply is not currently enough evidence before this court to support petitioner's assertion

that Henderson instructed Shemwell to mislead the court or that he, himself, purposefully misled the court.

In summary, the evidence in question was the type of evidence that should have been disclosed to counsel prior to petitioner's resentencing; it appears at some point General Henderson knew or should have known such evidence existed; it further appears that re-sentencing counsel were not provided this evidence prior to trial; and it appears both Shemwell and Henderson inadvertently misled the resentencing court about the existence of such evidence. In evaluating the likelihood that relief will be granted based upon Henderson's actions, the only remaining question is whether the evidence in question is "material" such that the failure to provide it violated due process. This court finds that, given the fact that Voyles was eliminated as a suspect and never charged in this case; the fact that counsel was aware that Voyles had been identified as a potential suspect based upon a crime stoppers tip; the fact that the jury heard that Darnell was unable to identify the petitioner; and, the fact that the physical evidence linking petitioner to the murder was strong, the Stewart supplement and the actual photo array singed by Darnell, were not particularly material to the issues addressed at resentencing.

This court finds, based on the very limited proof now before it, the materiality of the missing evidence in the context of resentencing is minimal. Thus, the petitioner is unlikely to receive relief based upon his *Brady* claim and is likewise unlikely to receive relief based upon his claims of prosecutorial misconduct. While Mr. Pera seemed to focus on the severity of the allegations against General Henderson, this court focuses equally on the consequences of such alleged conduct. This court acknowledges that the allegations raised by petitioner are serious, however, this court does not have sufficient proof currently before it to determine that bad faith

was the motivation for Henderson's actions.[40] Moreovoer, even accepting petitioner's allegations as true, the court finds little likelihood petitioner will receive relief based upon Henderson's conduct. Thus, the court cannot find that a challenge to such claims would somehow violate the prosecutor's ethical duties to seek justice. Given that valid legal grounds exist for challenging petitioner's assertion that he deserves a new trial, this court does not find Henderson's personal interest in defending against petitioner's allegations would so materially limit his ability to perform his duty as a prosecutor to "seek justice," as to require his disqualification.

It appears to this court that the appellate courts have drawn some distinction between disqualification for purposes of trial and disqualification after conviction. Despite the Board of Professional Responsibilities' opinion to the contrary, the appellate courts seem to acknowledge a difference in the ethical ramifications of a prosecutor who has been accused of misconduct during the active prosecution an individual who has alleged such misconduct and the ethical ramifications of a prosecutor defending his actions either on appeal or in a post conviction proceeding. In this court's opinion such a distinction is appropriate.

The role of the prosecutor at trial is to present the evidence, within the bounds of the Rules of Evidence, Rules of Criminal Procedure and Rules governing ethical conduct, to an impartial jury for their determination as to a defendant's guilt or innocence. The defendant is presumed innocent and the State has the burden of proof. At a post conviction proceeding, defendant is stripped of his presumption of innocence, the State is entitled to the strongest legitimate view of the evidence presented and the defendant bears the burden of establishing that

[40] This court notes that counsel has submitted numerous documents relating to the actions of Assistant District Attorney General Henderson in other cases before the criminal courts of this State. While this court has given counsel wide latitude in making its record as to the issue of disqualification, this court has focused on the evidence pertaining to the allegations raised in this case. This court finds evidence of actions taken by Henderson outside the context of this case to be of very little relevance to the determination of issues currently before this court.

his conviction and or sentence should be modified or reversed. The prosecutor's role is no longer to present evidence; rather, the prosecutor's role is to defend, without offense to their ethical obligations and within the bounds of the Rules of Evidence and Criminal Procedure, what they reasonably believe to be a valid conviction and sentence.

Nevertheless, this court concludes, given the seriousness of the allegations presented by counsel and the court's finding that: (1) favorable evidence was likely not turned over by the State at petitioner's resentencing proceeding; and (2) both Shemwell and Henderson, although likely inadvertently, misled the resentencing court, the appearance of impropriety associated with Henderson's continued involvement in the case necessitates his removal. The court is particularly concerned about Henderson's representation to the court regarding Officer Shemwell's testimony. As this court has repeatedly noted, additional evidence may be presented at the post conviction hearing which persuades this court that General Henderson acted in bad faith in this regard. Although the court does not find the proof currently before it warrants such a conclusion this court finds the potential that additional evidence could alter the court's determination mandates erring on the side of caution. Therefore, this court finds that the potential for the appearance of impropriety is too great in this case to allow General Henderson to participate in these post conviction proceedings. More importantly, this court finds it is very likely that General Henderson will be called as a witness in this matter; and, based on that circumstance, alone, the court finds he should be removed.

II. Shelby County District Attorney General's Office

As it relates to the disqualification of the entire Shelby County District Attorney General's Office, having found General Henderson has no conflict requiring disqualification, this court need only address whether the appearance of impropriety relating to General Henderson's representation should be imputed to entire Office. However, given that this court's ruling will inevitably be reviewed by the Appellate Courts, this court briefly addresses the allege conflict as it relates to the entire Shelby County District Attorney General's Office.

This court finds no material limitation interfering with the performance of the duties of the Shelby County District Attorney General's Office which would require disqualification of the Office or, in particular, of Deputy Attorney General, John Campbell. As noted above, this court finds that there are legitimate grounds for challenging petitioner's assertion that prosecutorial misconduct in the form of *Brady* violations violated his due process rights necessitating a new trial and/or sentencing hearing. Contrary to petitioner's assertions and the testimony of Mr. Pera that, by challenging the petitioner's assertions, the State is failing to perform its duty to seek justice and is instead seeking vindication of one of its own, this court finds that the State's challenges to petitioner's claims are based upon legitimate legal argument and not merely a subterfuge to "clear" Mr. Henderson's name.

The State may very well admit, as the court has preliminary found, that certain materials were not turned over to resentencing counsel and that Officer Shemwell gave testimony that was not accurate. Nevertheless, as the court has noted, the materiality of the withheld evidence and the substance of Officer's Shemwell's testimony is debatable. Although this court may ultimately find that the petitioner is entitled to relief, because, the legitimate grounds exist for the

State to challenge petitioner's claims, the mere fact such challenge may have the ancillary effect of exonerating Henderson or mitigating his conduct, does not necessarily create an conflict of interest mandating their disqualification.

It is not implausible to assume that the dueling interests in this case, namely, the duty of the prosecutor to his client, "justice," and the prosecutor's personal interest in upholding the reputation of individual's in his Office, are not in conflict. If the prosecutor reasonably believes that his client, "justice," is served by defending what he surmises was a validly obtained conviction and sentence; then, his personal interest in defending the actions of members of his office, is not in conflict with that responsibility. In order to find the two interests are in conflict, one must assume that the allegations of petitioner are true and that the prosecutor's service to his client, "justice," would be materially limited by his desire to somehow clear his colleague's name. However, based upon the evidence currently before the court, the court is not prepared to make this leap.

B. Appearance of Impropriety

Moreover, because this court finds a legitimate basis for contesting the petitioner's claims, this court likewise finds no appearance of impropriety regarding the continued representation of the state's interest by members of the Shelby County District Attorney General's Office. Shelby County has the largest District Attorney General's Office in the State. Unlike other jurisdictions, capital post conviction matters are typically not handled by the trial prosecutor; but, are assigned to one particular A.D.A. In many cases, Deputy Campbell, the A.D.A. who handles these matters for the Shelby County District Attorney General's office, did

not serve as a trial prosecutor on the case. As opposed to General Henderson, who is the subject of petitioner's allegations, Deputy Attorney General, John Campbell, did not represent the State at petitioner's original trial or his resentencing.

Despite Mr. Pera's assertion to the contrary, Deputy Campbell is not supervised by General Henderson. Moreover, this court finds that any involvement by General Henderson up to this point has been marginal and his role has primarily been that of a potential witness, who has pertinent knowledge about the facts at issue. This court finds nothing about that involvement creates such an appearance of impropriety as to warrant the disqualification of the entire Shelby County District Attorney General's Office. The potential for the appearance of impropriety if General Campbell or another Shelby County Assistant District Attorney General is allowed to continue his representation simply is not the same as that for General Henderson.

CONCLUSION

Although the court finds no personal conflict materially limiting General Henderson's ability to perform his duty as a prosecutor, this court does find that the potential for the appearance of impropriety as it relates to Henderson's representation of the state's interest in this matter is too great to allow his continued involvement. More importantly, because General Henderson will almost surely be called as a witness at the post conviction hearing, Rule 3.8 necessitates his removal from the case. The court further finds no conflict of interest disqualifying the Shelby County District Attorney General's Office from representing the State in this matter. Moreover, the court finds there is no appearance of impropriety warranting the

removal of the Shelby County District Attorney General's Office from this case. Therefore, petitioner's motion is **GRANTED** in part, **DENIED** in part.

It is so ordered, this the 20 day of May 2011.

James C. Beasley, Jr., Judge
Division 10